TRANSCRIPT OF RECORD

[redacted]

(16,646.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 147.

THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

W. T. MATTHEWS AND M. L. TRUDELL, COPARTNERS AS MATTHEWS & TRUDELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 5, 1898.

1-6 In the Supreme Court of the State of Kansas.

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, Plaintiff in Error,
vs.
W. T. MATTHEWS and M. L. TRUDELL, Copartners as Matthews & Trudell, Defendants in Error. } 10121.

Petition in Error.

The said plaintiff in error, The Atchison, Topeka and Santa Fe Railroad Company, complains of the said defendants in error, W. T. Matthews and M. L. Trudell, copartners as Matthews & Trudell, for that heretofore, to wit, on the 29th day of January, 1894, at a regular term of the district court of Cloud county, Kansas, the said defendants in error recovered a judgment from the said plaintiff in error by the consideration of said court for the sum of two thousand and ninety-four dollars ($2,094.00) and costs of suit in an action then pending in said district court, wherein the said W. T. Matthews and M. L. Trudell, copartners as Matthews & Trudell, were plaintiff- and the said Atchison, Topeka and Santa Fe Railroad Company was defendant. A copy of the record and case-made in which case is hereto attached, marked "Exhibit A," and made a part of this petition in error.

And said plaintiff in error avers that there is error in said record and proceedings as follows, to wit:

1. That said court erred in the admission of certain evidence at the trial of said cause, over the objections and exceptions of said railroad company.

2. That said court erred in excluding certain evidence at the trial of said cause offered by said railroad company; to which the said railroad company duly excepted.

3. That said court erred in giving certain instructions to the jury at the trial of said cause; to which the said railroad company duly objected and excepted.

4. That said court erred in refusing to give certain instructions to the jury at the trial of said cause which the said railroad
7 company prayed said court to give; to which the said railroad company duly excepted.

5. That the said court erred in overruling the motion filed by said railroad company to require the jury to answer certain special questions more definitely and specifically; to which the said railroad company duly excepted.

6. Misconduct and irregularity of plaintiffs' attorney in the argument of the case to the jury; to which the said railroad company duly objected.

7. That the said court erred in overruling the motion for judgment on the special findings of the jury filed by said railroad company; to which the said railroad company duly excepted.

8. That said court erred in overruling the motion for a new trial

filed by said railroad company; to which the said railroad company duly excepted.

9. That judgment was rendered in favor of the said Matthews & Trudell when, according to the law of the land, judgment should have been rendered in favor of said Atchison, Topeka and Santa Fe Railroad Company.

Wherefore plaintiff in error prays that said judgment may be reversed, set aside, and held for naught; that it may have judgment in its favor on the special findings of the jury, or that a new trial may be granted, and for such other and further relief as it may be entitled to in the premises.

A. A. HURD,
ROBERT DUNLAP,
W. LITTLEFIELD,
Attorneys for Plaintiff in Error.

Filed Dec. 31, 1894.

C. J. BROWN,
Clerk Sup. Court.

Precipe.

To the clerk of the supreme court:

Please issue summons in error in the above-entitled cause, directed to the sheriff of Cloud county, to be served upon W. T. Matthews and M. L. Trudell, copartners as Matthews & Trudell, or upon J. W. Sheafor, their attorney of record, returnable according to law.

ROBERT DUNLAP,
Attorney for Plaintiff in Error.

Filed Dec. 31, 1894.

C. J. BROWN,
Clerk Sup. Court.

8 EXHIBIT "A."

Filed Dec. 28, 1894.

B. F. ROSE,
Clerk Dist. Court.

9 Filed Dec. 28, 1894.

B. F. ROSE,
Clerk Dist. Court.

In the District Court of Cloud County, Kansas.

W. T. MATTHEWS and M. L. TRUDELL, Copartners as Matthews & Trudell, Plaintiffs,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, Defendant.

Be it remembered that on the 17th day of July, 1893, the plaintiffs filed their petition in the district court of Cloud county, Kansas, against the defendant in words and figures as follows:

In the District Court of Cloud County, Kansas.

W. T. MATTHEWS and M. L. TRUDELL, Copartners as Matthews & Trudell, Plaintiffs,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, a Corporation, Defendant.

Petition.

* * * * * * *

10 Thereafter, on the 13th day of October, 1893, the plaintiffs filed their amended petition in words and figures following, to wit:

11 (Omitting title.)

Come now the plaintiffs and in this their amended petition, filed by leave of court, allege that they are and were at all times hereinafter mentioned copartners in business under the firm name and style of Matthews & Trudell.

Plaintiffs further aver that the defendant is and was at all times hereinafter mentioned a corporation duly and legally organized and existing and duly authorized and empowered to operate a railroad in and through the State of Kansas, and that at all times hereinafter mentioned the said defendant owned, operated, and had the management and control of a line of railroad extending through the county of Cloud, in the State of Kansas, and running said line from the town of Strong city, in said State, to the town of Superior, in the State of Nebraska.

Plaintiffs allege that on the 17th day of April, A. D. 1893, they were and for some time prior thereto had been the owners of the following personal property, to wit: One three-story iron-roofed frame elevator building and two-story frame dump-rooms, and one-story frame and store engine and boiler room attached thereto, and the fixed and movable machinery and implements contained therein, situate on the right of way of the Kansas Central division of the U. P. railway, between block twenty-three (23) and North park, in city of Miltonvale, in said county of Cloud and State of Kansas.

That on the 17th day of April, A. D. 1893, the said defendant, The Atchison, Topeka & Santa Fe Railroad Company, while running one of its trains on the said road, in said county of Cloud—the same being an extra or freight train, going west, at about five or six o'clock p. m. of said day, at or near the said property of plaintiffs—managed its said train carelessly, unskillfully, and negligently, and failed to employ suitable means to prevent the escape of fire from the engine that was running said train; and the said engine being defective and out of repair, and so negligently permitted to be by said defendant, so that by reason of the carelessness, want of skill, and negligence of said defendant, as aforesaid, and the defective and unsound condition of said engine, sparks and coals of fire escaped and were cast out from the engine of said company on said

train at said time, and set fire to the dry grass and other material on the right of way of said defendant and on the premises occupied by said plaintiffs with said property, and that by reason of a continuous body of dry grass and other material, and without any fault of said plaintiffs, it was communicated to the premises of said plaintiffs and to the property of plaintiffs, and then and there injured, burned, and destroyed the said elevator, dump-rooms, and engine and boiler room, and all the machinery, fixtures, and implements therein belonging to said plaintiffs, and of the total value of six thousand dollars ($6,000).

Plaintiffs further aver that they are entitled to have and recover of and from said defendant a reasonable attorneys' fee herein for the institution and prosecution of this suit, and that the sum of three hundred dollars ($300) is a reasonable attorneys' fee in this cause for said services.

Plaintiffs say that on the 8th day of August, 1893, the Insurance Company of North America, of the city of Philadelphia and State of Pennsylvania, through its agency at Miltonvale, Kansas, issued to said plaintiffs a policy of insurance on the said property
12–159 hereinbefore described for one year, terminating on the 8th day of August, 1893, for the sum of two thousand dollars ($2,000); that after the said loss by fire the said insurance company adjusted and paid to the said plaintiffs under and by virtue of the said policy the sum of one thousand eight hundred and fifty dollars ($1,850).

Plaintiffs say that by reason of said fire and destruction of said elevator and other property of plaintiffs hereinbefore described the plaintiffs have sustained damage, after deducting the amount received by plaintiffs under said policy, in the sum of four thousand one hundred and fifty dollars ($4,150).

Wherefore plaintiffs pray judgment against said defendant for the sum of four thousand one hundred and fifty dollars ($4,150), their damage so, as aforesaid, sustained, with interest thereon, at the rate of six per cent. per annum, from the 17th day of April, 1893; for the further sum of three hundred dollars ($300) as attorneys' fee herein, for costs of suit, and all other proper relief to which plaintiffs may be entitled.

J. W. SHEAFOR,
Attorney for Plaintiff.

Thereafter, on the 27th day of October, 1893, the defendant filed its answer to plaintiffs' amended petition in the following words and figures:

(Omitting title.)

Now comes the defendant, The Atchison, Topeka & Santa Fe Railroad Company, and for answer to plaintiffs' amended petition filed in this case:

1. Denies each and every, all and singular, the allegations and averments in said petition contained.

2. For a second and further answer and defense to the alleged cause of action set forth in the amended petition of said plaintiffs

in this case said defendant says that the fire which plaintiffs allege destroyed their property was caused by their own carelessness and negligence and by want of due care and caution on their part, and was in no manner caused by the carelessness, negligence, or fault of said defendant, its agents, servants, or employees.

Wherefore defendant prays to be hence dismissed with its costs.

A. A. HURD,
W. LITTLEFIELD, AND
KENNETT, PECK & MATSON,
Attorneys for Defendant.

Thereafter, on November 23rd, 1893, with the consent of the defendant, the plaintiffs filed their reply to defendant's answer, as follows:

(Omitting title.)

Now come the plaintiffs above named and for reply to the second count and defense in the answer of said defendant herein filed say that they deny each and every allegation and averment of new matter therein contained.

J. W. SHEAFOR,
Att'y for Plaintiffs.

Thereafter, on the 23rd day of January, 1894, said cause came on for trial before the district court of Cloud county, Kansas, with a jury duly selected and impanelled.

* * * * * * *

160–165 I. A. RIGBY, a witness for the plaintiffs, being duly sworn, testified as follows:

Examined by Mr. J. W. SHEAFOR:

Q. You do not know anything about this fire, do you?
A. No, sir.
Q. Where do you live?
A. I live in Concordia, Kansas.
Q. How long have you lived here?
A. Very near sixteen (16) years.
Q. What is your business?
A. At the present time?
Q. Yes, sir.
A. I am practicing law.
Q. How long have you been practising law in this county?
A. I have been practicing law in this county since I was admitted, in June, 1885.
Q. Been practicing here ever since?
A. Yes, sir.
Q. What would be a reasonable attorney fee in a case brought by individuals against a railroad company to recover about four thousand dollars ($4,000.00), alleged to be the damage sustained by reason of a fire caused by the railroad company, which would involve the investigation of the case, preparation of the case for trial, the

taking of depositions at different points, and the trial of the case, lasting from, say, three (3) to five (5) days, and the examination of eighteen (18) or twenty (20) witnesses on the trial?

A. About how much time put in taking depositions?

Q. One deposition, taken at Guthrie, Oklahoma, and two at Oak Hill, Clay county, Kansas, say, consuming four (4) or five (5) days altogether.

A. Involving about how much money did you say?

Q. About four thousand dollars ($4,000.00).

A. It is worth from about three hundred and fifty dollars ($350.00).

* * * * * * *

166–267 E. S. ELLIS, a witness for the plaintiff-, being duly sworn, testified as follows:

Examined by Mr. J. W. SHEAFOR:

Q. Where do you reside?

A. I reside in this city.

Q. How long have you resided here?

A.. Three (3) years.

Q. What is your business?

A. Well, I practice law some.

Q. Of what firm are you a member?

A. Caldwell & Ellis.

Q. How many years have you been engaged in the practice of law?

A. Since 1881.

Q. What, in your opinion, would be a reasonable attorney fee in a case brought by individuals against a railroad company to recover about four thousand dollars ($4,000.00) as the damages and alleged value of property destroyed by reason of a fire alleged to have been set by the defendant railroad company, which involved the preparation of the case for trial, the institution of the case, the conduct of the trial, lasting from three (3) to five (5) days, the taking of depositions involving about five (5) days' time, the trial involving the examination of from eighteen (18) to twenty (20) or twenty-five (25) witnesses?

A. That is a very difficult question to answer, Mr. Sheafor. It depends very much upon the facts in the case, upon the amount of work it would require.

Q. Well, where the case is established or attempted to be established by circumstantial evidence, involving an inquiry into a good many facts and circumstances to establish the case on the part of the plaintiffs.

A. I understand your question to include the examination of twenty (20) to twenty-five (25) witnesses.

Q. Yes, sir. I wish you would read the question, Mr. Stenographer.

(6th question on this page read, being statement of case enquired about.)

A. It seems to me it would be a very limited basis for an attorney to fix his fees on without knowledge of the kind of property or location. It would be more of a guess than anything else.

Q. The property alleged to have been destroyed being an elevator in Miltonvale, this county, the claim being made that the fire was set by an engine of the defendant, by fire communicated to the building.

A. Why, I should think that probably from two hundred and fifty dollars ($250.00) to four hundred (400.00), depending altogether upon the amount of actual labor and work required.

* * * * * * *

268-270 Thereupon the court instructed the jury in writing as follows, to wit:

(Omitting title.)

1. This suit is brought by the plaintiffs, Matthews & Trudell, against the defendant, The Santa Fe Railroad Company, to recover for an elevator and machinery burned on the 17th of April last.

Plaintiffs claim that the defendant set the property on fire by sparks from one of its engines, which passed there a short time before; that the sparks escaped from the engine and fell on combustible material on defendant's right of way or plaintiffs' premises adjoining, which caught fire and the fire ran towards the building and fired it.

Plaintiffs also claim that this fire was negligently set by the defendant, in this, that the engine was not in good condition nor properly managed; that the value of the property destroyed was $6,000, and for this they ask judgment, with interest, less what they have already received from the insurance they had thereon. Excepted to by defendant.

F. W. STURGES, *Judge.*

2. The defendant admits that it is a railroad corporation, and that the property was burned. It denies, however, all the other allegations of the plaintiffs—that is, it denies that it in any way set the fire; that it was guilty of any negligence; that the property was worth what plaintiffs claim, and insist that, even if it had set the fire and been guilty of negligence in so doing, it would not be liable to plaintiffs, because they were themselves guilty of contributory negligence—that is, negligence without which the loss would not have occurred.

* * * * * * *

271 7. If you find that defendant set the fire, and negligently, and the plaintiffs are without contributory negligence on their part, then they are entitled to recover; but if you do not so find, of course, they are not.

If they are entitled to recover, their recovery should be the fair value of the property at the time and place destroyed, less what they have already received, with interest at six (6) per cent. The value of their property is not necessarily what it costs, but what it was reasonably worth, taking into consideration its age, the depreciation, if any, in values, the demand for such property, as well as every circumstance shown in connection therewith by the evidence, and if they are entitled to recover they are also entitled to recover a reasonable attorney's fee for the conduct of their suit.

272–283 You are the exclusive judges of the evidence and of what is shown thereby, and in determining what is shown you should take into consideration all the evidence—all the facts and circumstances shown thereby—and you may also use the knowledge and experience you possess in common with the generality of mankind.

Excepted to by defendant.

F. W. STURGES, *Judge.*

Given.

F. W. STURGES, *Judge.*

To the giving of said instructions and each and every one thereof the defendant at the time duly excepted.

* * * * * * *

284–288 The above and foregoing proceedings are shown by the following journal entry of judgment entered in this case in Journal —, at page —, Records of District Court of Cloud County, Kansas:

(Omitting title.)

Now, on this 23rd day of January, 1894, that being one of the days of the regular January, 1894, term of the district court of Cloud county, Kansas, this cause coming on for trial, the plaintiffs appear in person and by their attorney, John W. Sheafor, Esq., and the defendant appears by its attorneys, W. Littlefield and Kennett, Peck and Matson.

Thereupon came the following jury, to wit, ——, twelve good and lawful men from the body of the county, who, being sworn to well and truly try the issues joined and a true verdict render according to the law and the evidence, after hearing the evidence, were instructed in writing by the court.

After argument by counsel the jury retired in charge of a sworn officer to consider of their verdict, and afterwards, upon the 29th day of January, 1894, returned into court their verdict, as follows:

(Omitting title.)

We, the jury impanelled and sworn in the above-entitled case, do upon our oath find for the plaintiffs in the sum of $2,000, with interest at the rate of six per cent. from the 17th day of April, 1893, and attorneys' fee, $225.

F. S. WALLACE, *Foreman.*

* * * * * * *

289 Thereupon plaintiffs moved for judgment upon the verdict and findings in their favor, which was by the court allowed; to which ruling of the court the defendant duly excepted.

Thereafter, upon the 31st day of January, 1894, the defendant filed its motion for a new trial upon the grounds therein stated; which motion came on to be heard on the 30th day of April, 1894, that being one of the days of the April, 1894, term of the district court of Cloud county, Kansas, and was by the court overruled; to which ruling of the court the defendant excepted.

Thereupon, for good cause shown, the defendant is allowed ninety (90) days from this 30th day of April, 1894, in which to make and serve a case made for the supreme court upon the plaintiffs, plaintiffs to have fifteen (15) days after service upon them in
290–296 which to suggest amendments thereto, the case to be settled thereafter upon five (5) days' notice by either party.

It is therefore considered, ordered, and adjudged by the court that the plaintiffs have and recover of and from defendant the sum of two thousand and ninety-four dollars ($2,094.00), with six (6) per cent. interest from January 29th, 1894, and an attorney's fee of two hundred and twenty-five dollars ($225.00). Execution stayed until ten (10) days after the expiration of the time for settling the case made.

* * * * * * *

297 And afterward, on the 10th day of July, 1897, the same being one of the regular judicial days of the July term, A. D. 1897, of the supreme court of the State of Kansas, the said court being in session at the supreme court room, in the city of Topeka—present, Hon. Frank Doster, chief justice, and Hon. W. A. Johnston and Hon. Stephen H. Allen, associate justices, and John Martin, Esq., clerk of the said supreme court—the following proceeding was had and entered of record as follows, to wit:

A., T. & S. F. R'L'D Co., Pl'ff in Error,
vs.
W. T. MATTHEWS ET AL., ETC., Def'ts in Error. } No. 10121.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that plaintiff in error pay the costs of this case in this court, taxed at $——, and hereof let execution issue.

298 And also on the 10th day of July, 1897, there was filed in the office of the clerk of the supreme court of the State of Kansas a syllabus and opinion of the said supreme court in said cause, which is in words and figures as follows, to wit:

299 ATCHISON, TOPEKA & SANTA FE R. R. Co. vs. W. T. MATTHEWS ET AL. } 10121.

Error from Cloud county. Affirmed

Syllabus by the Court—Allen, J.

1. Claims of error in the admission of testimony considered and held insufficient to warrant a reversal of the judgment.
2. Section 2 of chapter 155 of the Laws of 1885, which authorizes the allowance of an attorney's fee in actions against railroad companies to recover damages caused by fire in the operation of the railroads, does not violate the first and eighteenth sections of the bill of rights of the constitution of this State or section 1 of article 14 of the Constitution of the United States, but is a valid law.
3. In an action against a railroad company to recover damages for the destruction of an elevator by fire, alleged to have been negligently caused by the company in the operation of its railroad, it is not indispensible to prove by direct evidence that the fire escaped from an engine on the defendant's road, but if the circumstances shown are adequate to convince reasonable men that the fire was so caused, the jury may properly base a verdict thereon, and held that there was sufficient testimony in this case to uphold a verdict against the company.
4. While it is the imperative duty of the trial court to sustain a motion for a new trial in all cases where there is an utter
300 failure to prove any essential fact necessary to support the verdict, and also where the judge is of the opinion that the verdict is clearly opposed to the weight of the testimony in cases of doubt where there is sufficient testimony to support the verdict, if the court, after a full consideration of it, approves the verdict and enters judgment thereon, this court will not reverse his action merely because he states that he doubts the correctness of the verdict and would not have found as the jury did if the case had been submitted to him as a trier of the facts. In doubtful cases where the jury have acted fairly and conscientiously on conflicting evidence, the trial court may properly defer to the judgment of the jury and approve a verdict, even though acting on his own judgment alone he would have reached the opposite result.

All the justices concurring.

301 ATCHISON, TOPEKA & SANTA FE R. R. CO. vs. W. T. MATHEWS ET AL. } 10121.

Error from Cloud county. Affirmed.

The opinion of the court was delivered by ALLEN, J.:

This action was commenced by W. T. Mathews and M. L. Trudell against the Atchison, Topeka & Santa Fe Railroad Company to recover damages for the destruction of their elevator building in Miltonvale, which, they alleged, was burned by fire negligently permitted to escape from one of the defendant's locomotives. The trial in the district court resulted in a verdict and judgment in favor of the plaintiffs for $2,094 damages and $225 attorneys' fees. The building was situated on the right of way of the Union Pacific Railway Company, about 88 feet north from the track of the defendant. The fire was first discovered between half past six and seven o'clock. The evidence favorable to the plaintiffs, which seems to have been accepted by the jury, tends to show that the elevator had been operated on the day of the fire, which occurred April 17, 1893; that some dust and trash was necessarily scattered around the outside of the building from a spout through which corncobs were discharged; that at about six o'clock a freight train passed along the defendant's road going west without stopping; that as the train came in steam was shut off for a time, but that before it passed the elevator steam was put on again, and that as it passed the elevator office, located a short distance east of the elevator building, cinders were
302 thrown from the smoke-stack to the office building; that the wind was then blowing from the southwest; that about a week before this fire another one had been started in that vicinity by the same engine; that the fire originated on the outside of the south side of the engine and boiler room, which were located at the west end of the elevator, and that while there was a fire in the furnace in the boiler-room of the elevator it had been safely fixed so that there was no danger of its escaping and burning the building. Some of the evidence on the part of the defendant tended to show that the fire originated inside the boiler-room. While the evidence in this case was wholly circumstantial, the defendant's contention that there is no proof to support the verdict cannot be sustained. The proof with reference to fires caused by locomotive engines is nearly always of the same character, though of different degrees of convincing force. Numerous objections were raised to the testimony. Proof was allowed as to the cost of the building, but as the verdict is for an amount below the lowest estimate of any witness of the value of it, the error in the admission of the testimony is of no importance. Testimony was also allowed with reference to other fires that originated from engines on the defendant's road without identifying the engine attached to this freight train or the engineer in charge of it as the one causing the fires. We think the identification should have preceeded the admission of such testimony, but the court, in the progress of the trial, remarked, "Unless you can

connect this engine with those fires I will instruct the jury that this evidence is not to be considered." In view of all the testimony in the case, the special findings, and this remark from the court in the presence of the jury, the error in the admission of this testi-
303 mony does not appear to be sufficient to warrant a reversal of the judgment. We think the instructions were very full, clear, and fair.

We do not regard the decision of the Supreme Court of the United States in the case of G., C. & S. F. R. R. Co. *vs.* Ellis, 17 S. C. R., 255, as conclusive against the validity of our statute authorizing the recovery of attorneys' fees in cases of this kind. The statute of Texas under consideration in that case was quite different in principal from the one on which the judgment in this case was rendered. Our statute is somewhat in the nature of a police regulation, designed to enforce care on the part of railroad companies to prevent the communication of fire and the destruction of property along railroad lines. It is not intended merely to impose a burden on railroad corporations that private persons are not required to bear, and the remedy offered is one the legislature has the right to give in such cases. This is the view heretofore held by this court, which we see no reason for changing. St. Louis & San Francisco R'y Co. *vs.* Snavely, 47 Kas., 637; *Id. vs.* Curtis, 48 Kas., 179; *Id. vs.* McMullin, *id.*, 281; Mo. Pac. R. R. Co. *vs.* Henning, *id.*, 465.

We find no substantial error in the refusal of the court to require the jury to answer certain special questions. If all of them had been answered favorably to the defendant they would not have necessitated a reversal of the judgment. There was no error in overruling the plaintiff's motion for judgment on the special findings, although it was found that the engine was properly constructed and equipped with the best known appliances for the prevention of the
304 escape of fire. Liability was based on the unskillful manner in which the engine was operated, and there was proof tending to show that cinders were thrown from the engine as a result of "working steam too hard."

The most difficult question in the case arises from the language used by the court in overruling the motion for a new trial. The colloquy between court and counsel at the time the motion was passed on is incorporated in the record. Among other things, the judge said: "This evidence does not carry any conviction to my mind either way. You say it is quite evident the fire originated from the building itself, from the engine or boiler, or machinery, while Mr. Sheafor says it is equally as clear that they had nothing to do with it; that the fire could not have originated in that manner. I think—and what I have thought about this case from the beginning is—that there is no certainty as to who set the fire, and it is not clear to my mind yet; and you might offer this evidence twenty times, and I should never be satisfied as to the origin of that fire—whether it arose from the railroad or whether it arose from the engine and boiler. I will say this, as I have said, if I had been on that jury I should not have found that verdict, not that I would have been positive that the road didn't set it afire, but because I

could not have had evidence enough to satisfy my mind that the road did set it afire. If the court should grant a new trial in every case where he would not have found the same verdict as the jury, why then I should grant a new trial in this case, because I would not have found that verdict, because I could not have found that the defendant set the fire; but then if the court is to be the sole judge and arbitrator, what is the duty and object of the jury? I
305 take it the jury were a fair average jury, men of good judgment, just as good as the court, if not better, in matters of this kind, and just as honest and conscientious. It comes down to that, as you very properly say—that is, there are two possible causes, and a fair statement is that the probabilities are about equal.

You claim the probabilities are that the road set the fire. They claim that the probabilities are that the engine set it afire. Now the possibilities are equal, and the probabilities are not far apart; you each claim to suit your theory. That is just the condition of this case, and the case was submitted to a jury, and the jury found for the plaintiff and against the railroad. Now the question is, ought the court to put itself and its judgment against that of the jury and find the other way? Well, the case has been tried and two theories have been submitted. I take it there has been some evidence in support of each theory, and possibly enough to justify a verdict on whichever theory the jury saw fit to find, and the object and purpose, the duty, of the jury being, as I understand it, to pass upon such questions, I will let the judgment stand, although to my mind the evidence is not convincing." There are other statements made by the judge, some of which are slightly stronger in opposition to the verdict than those quoted, but the parts extracted seem to be fairly expressive of the view taken by the court of the case and of his duties in passing on the motion.

It has often been held that if the verdict does not meet the approval of the court it should be set aside. Richolson *vs.* Freeman, 56 Kan., 463; R. R. Co. *vs.* Ryan, 49 Kan., 1, and cases cited.
306 On the other hand, the verdict of a jury has some force, and it is not for the trial court in every doubtful case to set his judgment against that of the jury. As was well said in the case of Johnson *vs.* Leggett, 28 Kan., 590, "We do not understand that it is the duty of the trial court where a doubtful question of fact exists to disturb the verdict of the jury simply because its judgment inclines the other way. The case of Williams *vs.* Townsend, 15 Kan., 564, carries no such intimation. The jury are the triers of the fact, and while it is the duty of the district court to interfere, yet, as stated in that case, it is only when they have manifestly mistaken the evidence and where the verdict is manifestly erroneous. Where the question is absolutely doubtful, where some men would naturally come to one conclusion and others to the opposite, then the verdict of the jury is conclusive. They are the triers of the fact, and although the judgment of the court may incline against the verdict of the jury, yet it ought not to interfere." In this case it clearly appears that the court regarded the case as a doubtful one—that the jury were good men, against whom the court entertained no suspicion

of bias or unfairness. The evidence was very full, and probably as well presented and as fairly considered as it would have been on a second trial. The remarks of the court indicate no disposition to shirk responsibility, or to act hastily, and after a full consideration of all the questions involved, although himself inclined to find for the defendant on the facts, he yet approved the verdict in deference to the judgment of the triers of fact. Although in his remarks he expressed some uncertainty as to what his duties were under
307–315 the circumstances, we think he entertained a correct judgment as to what the trial court should do under the circumstances, and that this court would not be warranted in reversing his ruling on the motion for a new trial. The judgment is affirmed.

All the justices concurring.

316 10121.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of Kansas, Greeting.

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the State of Kansas, before you, being the highest court of law or equity of said State in which a decision could be had in said suit, between The Atchison, Topeka & Santa Fe Railroad Company, plaintiff in error, and W. T. Matthews and M. L. Trudell, copartners as Matthews & Trudell, defendants in error, wherein it was claimed that a certain statute of the State of Kansas is invalid as repugnant to section 1 of the fourteenth amendment to the Constitution of the United States and the decision was against the claim set up by the plaintiff in error under said section 1 of the fourteenth amendment to the Constitution of the United States, a manifest error hath been, to the great damage of the said Atchison, Topeka & Santa Fe Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days of the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

317 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of

July, in the year of our Lord one thousand eight hundred and ninety-seven.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas,
By F. H. HOLT, *Deputy.*

Allowed by—
FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

318 [Endorsed:] 10121. Filed Jul- 23, 1897. Jno. Martin, clerk sup. court.

319 And arterwards, on the 28th day of July, 1897, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation, which, with due service thereof endorsed thereon, is in words and figures as follows, to wit:

320 STATE OF KANSAS, } *ss:*
Cloud County, }

On this 26 day of July, A. D. 1897, personally appeared before me, the undersigned, notary public in and for said Cloud county, W. R. Moses, and made oath that he delivered a copy of the within citation to W. T. Matthews, one of the partners of Matthews and Trudell, for the defendants in error, W. T. Matthews and M. L. Trudell, copartners as Matthews and Trudell.

W. R. MOSES.

Subscribed and sworn to before me this 26 day of July, 1897.

[Seal of D. H. Atwood, Notary Public, Cloud County, Kan.]

D. H. ATWOOD,
Notary Public in and fo- Cloud County, Kansas.

My commission expires June 16th, 1900.

321 UNITED STATES OF AMERICA, *ss:*

To W. T. Matthews and M. L. Trudell, copartners as Matthews & Trudell, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein The Atchison, Topeka & Santa Fe Railroad Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas, this 22nd day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

322 [Endorsed:] 10121. A., T. & S. F. R'l'd Co. *vs.* Mathews & Trudell. Citation. Filed Jul- 28, 1897. Jno. Martin, clerk sup. court.

323 In the Supreme Court of the State of Kansas.

I, John Martin, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all the pleadings and papers filed and of all the proceedings had in the above-entitled cause, as the same remain on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas, affixed hereto, at my office in Topeka, this 12th day of Aug., 1897.

JNO. MARTIN,
Clerk of the Supreme Court.

324 In the Supreme Court of the United States.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, Plaintiff in Error,
vs.
W. T. MATTHEWS and M. L. TRUDELL, Copartners as Matthews & Trudell, Defendants in Error.

The plaintiff in error in the above-entitled case intends to rely upon the following statement of errors, namely:

First. That the said supreme court of the State of Kansas erred in rendering judgment against the said plaintiff in error, affirming the judgment of the district court of Cloud county, Kansas, rendered in favor of the defendants in error and against the said plaintiff in error, in so far as was included therein a recovery of attorney's fees for said defendants in error.

Second. That said supreme court of the State of Kansas erred in deciding in said action—it being an action brought and prosecuted in the district court of Cloud county, Kansas, by said defendants in error as plaintiffs against said plaintiff in error as defendant to recover damages for the destruction of property by fire caused through the negligence of said plaintiff in error in the operation of its railroad—that said defendants in error were entitled to recover attorney's fees against said plaintiff in error under section 2 of chapter 155 of the Laws of Kansas, 1885, page 258, entitled "An act relating to the liability of railroads for damages by fire," and which section reads as follows:

"In all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment."

And in deciding that section 2 of said act of the legislature of the State of Kansas was not repugnant to section 1 of the fourteenth amendment to the Constitution of the United States, but
325 that the "remedy afforded by it is one the legislature has the right to give in such cases."

Third. That said supreme court of the State of Kansas erred in approving the following instruction given by the district court of Cloud county, Kansas, to the jury upon the trial of said case, namely: "If they (said defendants in error) are entitled to recover, they are also entitled to recover a reasonable attorney's fee for the conduct of their suit;" which instruction was duly excepted to by said plaintiff in error at the time it was given.

And of the following parts of the record and proceedings which it deems necessary for the consideration thereof and to be printed, to wit:

All on page 4 of the record down to and including the word "petition." (Omit balance of original petition.)

Then beginning at the top of page 8 and including all of pages 8, 9, 10, 11, and 12, being the amended petition, the answer thereto, and the reply to the answer, and that which follows the reply on page 12.

The testimony-in-chief of L. A. Rigby, on page 222, and the testimony-in-chief of E. S. Ellis, on page 229.

The first and second instructions of the court to the jury, on page 366, and the seventh instruction of the court to the jury, beginning on page 372 and concluding on page 373, and that which follows it on page 373.

All of page 398 and the first three lines of page 399, down to and including the words "F. S. Wallace, foreman."

All after the first two lines on page 410, being the journal entry of judgment, except the special findings of the jury, the motion of the plaintiff in error to require the jury to answer more definitely certain special questions, the ruling of the court thereon, and the motion of plaintiff in error for judgment in its favor upon
326 the special findings, and the rulings of the court thereon.

Also the petition in error in said case, filed in the Kansas supreme court December 31st, 1894, pages 1 and 2 of the record, and the judgment, syllabus, and opinion of the supreme court of the State of Kansas rendered in said case.

E. D. KENNA,
A. A. HURD,
W. LITTLEFIELD, AND
BRITTON — GRAY,
Attorneys for Plaintiff in Error.

327 [Endorsed:] Case No. 16,646. Supreme Court U. S., October term, 1897. Term No., 147. The Atchison, Topeka & Santa Fe R. R. Co., P. E., *vs.* W. T. Matthews & M. L. Trudell, co-

partners, &c. Assignment of errors & designation by pl'ff in error of parts of record necessary to be printed. Office Supreme Court U. S. Filed Oct. 16, 1897. James H. McKenney, clerk.

328 In the Supreme Court of the United States.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, Plaintiff in Error,
vs.
W. T. MATTHEWS and M. L. TRUDELL, Copartners as Matthews & Trudell, Defendants in Error.

Affidavit.

STATE OF KANSAS, } ss:
County of Cloud, }

On this 21st day of October, 1897, personally appeared before me, a notary public in and for the said county, D. H. Atwoode and made oath that he delivered a copy of the statement of errors on which The Atchison, Topeka & Santa Fe Railroad Company, plaintiff in error, intends to rely in the above-entitled case and of the parts of the record which it thinks necessary for the consideration thereof, which *was* filed in the said Supreme Court of the United States in the above-entitled cause on the 16th day of October, 1897, to W. T. Matthews, one of said defendants in error.

D. H. ATWOODE.

Subscribed and sworn to before me this 22 day of October, 1897.

[Seal of John B. Morris, Notary Public, Cloud County, Kan.]

JOHN B. MORRIS,
Notary Public.

My commission expires 9, 12, '99.

329 [Endorsed:] No. —. In the Supreme Court of the United States. Atchison, Topeka & Santa Fe Railroad Company *vs.* W. T. Matthews *et al.* Proof of service of statement of errors.

330 [Endorsed:] Case No. 16,646. Supreme Court U. S., October term, 1897. Term No., 433. The Atchison, Topeka & Santa Fe R. R. Co., pl'ff in error, *vs.* W. T. Matthews and *A.* L. Trudell, partners, &c. Proof of notice of statement of errors & designation of parts of record to be printed. Office Supreme Court U. S. Filed Oct. 25, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,646. Kansas supreme court. Term No., 147. The Atchison, Topeka and Santa Fe Railroad Company, plaintiff in error, *vs.* W. T. Matthews and M. L. Trudell, copartners as Matthews & Trudell. Filed August 18, 1897.